Supreme Court of the United States

2112

PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. MOTION FOR LEAVE TO FILE, and PETITIONS FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, THE HONORABLE BEN H. RICE, JUDGE OF THE SAME, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION AND JUDGE JAMES V. ALLRED, JUDGE OF THE SAME.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

GEORGE B. PARR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

GEORGE B. PARR, *Petitioner*

v.

BEN H. RICE, District Judge, *Respondent*

No. Misc.

GEORGE B. PARR, *Petitioner*

v.

BEN H. RICE, District Judge, *Respondent*

GEORGE B. PARR, *Petitioner*

v.

JAMES V. ALLRED, District Judge, *Respondent*

MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

The petitioner moves the Court for leave to file the petition for writs of mandamus and prohibition hereto annexed; and further moves that an order and rule be

entered and issued directing the Honorable The United States District Court for the Western District of Texas, Austin Division, and the Honorable Ben H. Rice, Judge of the United States District Court for the Western District of Texas, Austin Division, and the Honorable The United States District Court for the Southern District of Texas, Laredo Division, and the Honorable James V. Allred, Judge of the United States District Court for the Southern District of Texas, Laredo Division, to show cause why writs of mandamus and prohibition should not be issued against them in accordance with the prayer of said petition, and why your petitioner should not have such other and further relief in the premises as may be just and meet.

THURMAN ARNOLD

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1229 - 19th Street, N. W.
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Counsel for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, THE HONORABLE BEN H. RICE, JUDGE OF THE SAME, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION AND JUDGE JAMES V. ALLRED, JUDGE OF THE SAME.

A. OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. It appears hereinafter at A. 16. The memorandum opinion of Judge Kennerly transferring the first indictment to Laredo appears hereinafter at A. 1. The oral opinion of Judge Kennerly dismissing the first indictment appears hereinafter at A. 13.

B. JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. 1254 (1) and 28 U.S.C. 1651. The judgment of the Court of Appeals dismissing the appeal in *Parr* v. *United States* and denying the writs in *Parr* v. *Rice* was rendered on July 13, 1955 (R. 272).

C. QUESTION PRESENTED

When the United States Attorney obtains an indictment in a venue where the defendant cannot get a fair trial and for that reason the court on motion of defendant, following consideration of evidence and a hearing, transfers the case to a venue where he finds neither side will be at a disadvantage, does the United States Attorney have the privilege of avoiding trial in the division to which the case has been transferred by dismissing the transferred indictment and obtaining another indictment charging the identical offense in another venue?

D. FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

"Rule 21. Transfer from the District or Division for Trial

"(a) For Prejudice in the District or Division. The court upon motion of the defendant shall transfer the proceeding as to him to another

district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

"(b) Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and *if the court is satisfied that in the interest of justice the proceeding should be transferred* to another district or division in which the commission of the offense is charged.

"(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, *and the prosecution shall continue in that district or division.*" (Emphasis supplied).

* * * * * *

"Rule 48. Dismissal.

"(a) By Attorney for Government. The Attorney General or the United States attorney may *by leave of court* file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant." (Emphasis supplied).

E. STATEMENT OF THE CASE

I. The Procedure In This Court

Succinctly stated, this case involves the transfer of a criminal indictment, brought originally in Corpus Christi, to Laredo on order of the court, the subsequent indictment of petitioner in Austin and the dismissal by the prosecution of the original, transferred indictment.

(a) Petitioner sought relief in the Court of Appeals for the Fifth Circuit against this evasion of the transfer order and the terms of Rule 21, (1) through appeal of the Laredo dismissal and (2) prerogative writs directed to the Austin court. The appeal was dismissed and the writs refused below. He now seeks ordinary certiorari from this judgment.

(b) Petitioner also seeks, in the alternative, the issuance of prerogative writs by this Court (1) to the Laredo court, to reverse the dismissal order, and (2) to the Austin court, to require it to transfer the second indictment back to Laredo.

This statement is intended to serve simultaneously as petition for the writ of certiorari and as petition for the prerogative writs.

II. The Facts

This case involves a unique and unprecedented attempt by the Government to circumvent a valid and effective order of transfer entered by a court under the provisions of Rule 21 of the Federal Rules of Criminal Procedure.

Petitioner Parr is a prominent political figure in the State of Texas. For some years prior to the

institution of this proceeding, he had been subjected to heated newspaper attacks on his honesty and character, particularly in the Corpus Christi Division of the Southern District of Texas. On November 15, 1954, an indictment was returned in that Division, charging petitioner in three counts with evasion of income taxes (R. 4).

Petitioner filed a Motion under Rule 21(a) of the Federal Rules of Criminal Procedure to transfer that indictment on the ground that he could not obtain a fair and impartial trial at Corpus Christi. The Government vigorously contested the change from Corpus Christi. It offered voluminous affidavits in opposition to a transfer to Laredo. (R. 27). The Corpus Christi court held extensive hearings on the motion. On April 27, 1955, it filed its opinion (per Kennerly, D.J., approved by Allred, D.J.) (R. 16-35), specifically finding that (R. 28):

> "A preponderance of the evidence reflected by such affidavits—and I have no doubt on the subject and find—*that there exists in the Corpus Christi Division of the Court so great a prejudice against Defendant that he cannot obtain a fair and impartial trial in this case in such division.*" (Emphasis supplied).

It transferred the case to the Laredo Division (R. 53), finding specifically that trial in that division would in no way prejudice the Government (R. 35):

> "Basing my findings, as I must, wholly on all the affidavits *I do not think that the evidence shows that the Government either will or might 'be under a severe handicap' in the prosecution of this case as claimed.* I find to the contrary." (Emphasis supplied).

The Government did not seek review of this order. However it soon became apparent that it had no intention of conforming to the court's decision that trial should go forward in Laredo. On May 3, six days after this opinion was filed (and actually prior to the formal entry of the transfer order [R. 53]), the Assistant Attorney General telegrammed the local United States Attorney that he was authorized to dismiss the indictment if an identical indictment could be obtained in Austin (R. 36). On the same day, the United States Attorney obtained an indictment from the Grand Jury, sitting in the Austin Division of the Western District of Texas, in all respects identical with the indictment which had been transferred. It was in three counts, charging evasion of income taxes; like the first, it alleged the filing of false returns in Austin (R. 37 et seq.). The very next day, the United States Attorney moved the Laredo court to dismiss the original, transferred indictment under Rule 48(a) of the Federal Rules of Criminal Procedure. In support of its motion, as required by Rule 48(a), the Government filed its statement of reasons. It pointed out that it had originally chosen to prosecute petitioner in Corpus Christi, that the decision was made prior to the transfer order to Laredo and that "the recent decision of the Court to transfer venue from Corpus Christi to Laredo . . ." had disturbed the prosecution's "over-all appraisal" of the strategy of the proceeding (R. 42, 43). Laredo, it reiterated, was unsatisfactory to the United States.

> "*The Attorney General believes* that prosecution should be had in the Western District of Texas and has initiated action accordingly." (R. 42). (Emphasis supplied).

The Laredo court ordered that petitioner be served with the Motion and be given an opportunity to be heard (R. 49-51). On May 16 Judge Kennedy conducted an extensive inquiry into the grounds for the dismissal, and heard testimony by Government counsel (R. 82-129).

The principal grounds on which the Government asked the Laredo court to approve dismissal of the indictment were as follows (R. 114):

> . . . the very fact that the case in the Southern District has now been transferred to Laredo and the fact that testimony will have to be elicited from witnesses who are either reluctant or hostile makes—throws a little different light on the Government's put on of venue, as it does on the Government's proof of other aspects of the case. I point out to you in that regard that Mr. Brown here, who was in the employ of Mr. Parr and signed the tax returns, was an employee of Mr. Parr, and he has lived down in that area. I'm going further into the case, but the change in the location affects the proof as to venue as it does the other facts of the Government's case.

Later in the Record, the Government summarized its position as follows (R. 115):

> "I think it has been very clear from several documents we have filed that we would have preferred the case to remain in Corpus Christi, and it is certainly clear from the action of the Attorney General and myself that the Government prefers that the case go to Laredo, and believes, in the exercise of his office as the chief prosecutor, it ought to be prosecuted there in Austin." (Emphasis supplied.)

titled and can dispense justice which will be effective and not sterile."

Judge [illegible] concurred upon the importance of the question stated as follows, [illegible]:

"... I would not state my reasons for dissent if I did not feel that this record presents an important question of procedure whose protection appellant is entitled to invoke and whose definition the bench and bar are entitled to have. It is the duty of the courts to hold the scale of justice in equal balance between the Government and a citizen charged with crime in exactly the same manner as those scales are held in litigation between two private individuals."

G. ARGUMENT

I. The Government May Not Circumvent Rule 21 and an Order of Transfer Entered After Hearing, by Re-indictment and Dismissal of the Transferred Indictment.

(a) Rule 21 and the Order of the Corpus Christi Court Required that the Prosecution Go Forward In Laredo.

We agree with the dissenting judge that this case presents a highly important question of the administration of justice under the Federal Rules of Criminal Procedure.[1] It breaks new ground. We have found no precedent in the reported federal cases of a United States Attorney reversing and evading a valid and effective order of transfer by dismissing the transferred indictment and instituting a second in another district charging the identical offense. Such

[1] Compare the issuance of certiorari in such cases as *Upshaw v. United States*, 335 U.S. 410 (1948) (Rule 5) and *United States v. Smith*, 331 U.S. 469 (1947) (Rule 33).

a procedural innovation is a fundamental evasion of the purpose of Rule 21(a) and of the court's order entered pursuant to the terms thereof, violates the plain meaning of Rule 21(c) and deserves the condemnation of this Court.

Our position on the merits may be shortly stated. The prosecution originally indicted petitioner in Corpus Christi for income tax evasion. Petitioner moved for a transfer of the proceeding under Rule 21(a) of the Federal Rules of Criminal Procedure on grounds that he would be denied a fair trial in Corpus Christi. Following a hearing and adjudication of the prejudice against petitioner in Corpus Christi *and absence of any "handicap" to the Government in Laredo*, the district court transferred the proceeding.

Rule 21(c) of the Federal Rules of Criminal Procedure provides as follows:

> "When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, *and the prosecution shall continue in that district or division.*" (Emphasis supplied)

This rule must mean what it says—that once the valid transfer of the Corpus Christi indictment was entered "the *prosecution* shall continue in [the Laredo] division"—and not in some other place. That order was conclusive as to the place of prosecution. The Government might have sought review of this action by mandamus and prohibition in the appellate court, but it did not do so. The order of the Corpus Christi Court, entered after hearing, constituted its

decision as to the place of trial and was final under Rule 21(c). "The prosecution" was required to "continue in that division".

The reindictment of petitioner in Austin and the dismissal of the transferred order constitutes a technique for escaping the consequences of this order which is procedurally indefensible. There is no support for it in the Rules. We have found no federal case reporting such a strategem in the past. Furthermore, the practice has been severely criticized in decisions of state courts. In *Ex Parte Lancaster*, 206 Ala. 60, 89 So. 721 (1921), defendant was indicted for murder in Walker County and, on his motion asserting prejudice, the court transferred the proceeding to Marion County. The prosecution then dismissed the indictment in Marion County and obtained a new indictment in Walker County. The Supreme Court issued a writ of prohibition forbidding the trial of the defendant in Walker County under the second indictment. It said (89 So. at 724/725):

> "Neither the Constitution nor the statutes of Alabama authorize the state to apply for or to secure a change of venue in any criminal case. Will the courts allow the state to secure a change of venue indirectly when it is not permitted directly to do so? What cannot be done directly by law, the law does not permit to be done indirectly. No change of venue can be granted by a court in a criminal case, except on application, petition, or motion of the defendant. The defendant must be the moving party for the change of venue, and not the state.
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> * * *
>
> "To give the state this right to have the trial returned to Walker County would deprive the

defendant of his right to be tried in Marion County for this offense. This would allow the state a change of venue, if permitted. The defendant cannot be deprived of this right to be tried in Marion county by motion of the state for a nolle prosequi to be entered, which is granted by the court. Neither the Constitution nor the statutes of Alabama ever contemplated that the defendant could in that way be deprived of his right of trial for the offense charged in Marion county. *To permit it, the state, with the approval of the court, by entering a nolle prosequi, could accomplish indirectly what the statute directly forbids, namely, a change of the trial of the defendant on the offense charged* from Marion back to Walker county, or some other county, perhaps.

"*The court cannot approve or encourage or permit such practice.* It will set no such precedent. It cannot permit a defendant to be liable to be harassed in that way." (Emphasis supplied).

We submit that Rule 21 compels a similar result here. Rule 21(*e*) requires the "prosecution" to "continue" in the transferee forum and thus, by operation of its plain terms, prohibits trial elsewhere on the charge. In the practice of the majority of states a transfer of venue by the court similarly invests the transferee court with exclusive jurisdiction.[4] The provision of Rule 21 makes clear that the rule was designed to conform federal practice to this aspect of state procedure. The prosecution cannot use the technique of

[4] See e.g. *Turner v. State*, 87 Fla. 155, 99 So. 334, 336 (1924); *Krafe v. District Court*, 16 Wyo. 381, 94 Pac. 459, 461 (1908).

dismissal to collaterally reverse a valid transfer order having this effect. *Ex parte Lancaster*, supra.

We must assume that the ordinary prosecutor, when trying a cause célèbre, will brush aside all consideration of fairness to the defendant in initially selecting a forum. It is obviously impossible for the court to interfere with his choice before the indictment is brought. Protection is accorded the defendant by Rule 21. But having made his initial choice of an unfair venue, in all conscience the prosecutor should be bound to try the case in the forum which the court decides, on defendant's motion to transfer, is a fair one to both sides. Otherwise the prosecutor can make a succession of choices. He may begin with the worst venue; if the case is transferred, retransfer the prosecution to the next most prejudiced by the device of dismissal, and so on.

This is a transparent technique for evading the consequences of a valid transfer order. The same judge would have conducted the trial, whether it went forward in Corpus Christi or in Laredo. The prosecution's preference for Corpus Christi must have been due to its desire to avail itself of the prejudice there. Then, after the court found that neither side would be prejudiced by trial in Laredo, prosecution decided to circumvent this finding and again to insist upon a forum of its own choice. Such shopping around, for an illegitimate advantage should not be sanctioned by this Court.[5]

[5] See also *Coleman v. State*, 83 Mis. 290, 35 So. 937 (1904); *State v. Milano*, 138 La. 989, 71 So. 131 (1916).

[6] The language of *Hampton v. Williams*, 33 F. 2d 46, 49 (8th Cir. 1929) is appliable here.

> "Congress did not intend that a party could voluntarily proceed in the court where the suit was filed until he became dissatisfied and then transfer the case. It gave the other court as he desired, but he could not experiment with both."

The sole argument made by the Government below, in answer to our substantive point, was that to outlaw dismissals by the prosecution as a technique for overruling a valid transfer order by the court would give the defendant the ultimate choice of venue and permit him to force trial in a "chosen sanctuary." (R. 268).

The answer to this claim of injustice to the Government is that the Government had all that it is entitled to ask for—a fair place of trial. It originally sought an unfair advantage in Corpus Christi. That advantage had been taken away by the change to Laredo. If as a result of an attempt to pick an unfair forum it has lost the chance to prosecute at Austin, the Government has learned the risks of an original unfair choice.

It cannot now be heard to argue that the District Court's order moved the trial to defendant's "chosen sanctuary", and that this constitutes an inequity to the Government justifying the extraordinary procedural innovation here. The proper way to test whether the court could have transferred to a forum other than Laredo was by mandamus in the Court of Appeals,[7] not by what was in effect a retransfer by the

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[7] Much the same situation was presented in *United States* v. *United States District Court*, 209 F. 2d 575 (6th Cir. 1954), where the court considered the propriety of a transfer order under Rule 21(b) of a similar indictment from the District in which the allegedly false return was filed to that in which it was prepared. The court held that (*id.* at 576):

> "Mandamus or a proceeding in the nature of mandamus is the appropriate procedure by which to decide the issue presented."

See also *General Portland Cement Co.* v. *Perry*, 204 F. 2d 316 (7th Cir. 1953); *Paramount Pictures* v. *Rodney*, 186 F. 2d 111 (3d Cir. 1951), cert. den. 340 U.S. 953 (1951).

Government. Rule 21 prohibits the Government from requesting a transfer, either on grounds of prejudice or "in the interests of justice"; it also makes no provision for a motion by the prosecution for retransfer after a transfer is once ordered on defendant's motion. The Notes of the Advisory Committee demonstrate that transfer, where justified, is a privilege to be accorded defendants, not the Government.[1] The prosecution here, however, sought to invest itself with a transfer power. It attempted to circumvent the valid order of the Corpus Christi court, entered after elaborate hearings and a decision as to the suitability of Laredo to both sides. It cannot justify a plain evasion of the terms of Rule 21(c) and the order of transfer by claiming an inequity which could have been tested by ordinary appellate remedies.

(b) The Prosecution May Not Use the Device of Dismissal Under Rule 48 to Secure a Transfer, and the Laredo Court Abused Its Duty in Granting the Dismissal Motion Admittedly Made for this Purpose.

After the Corpus Christi Court indicated it would grant defendant's transfer motion, the Government secured a second indictment in Austin for the purpose of circumventing its ruling, and moved in Laredo to dismiss the transferred indictment. Judge Kennerly set the dismissal motion down for argument and held an extensive hearing. During the course of that hearing, in the Statement of Reasons filed by the Government, and during the testimony of Government counsel, it was apparent to and acknowledged by both sides and the court that the sole reason for the dismissal

[1] The Notes of the Advisory Committee on the Rules state:

> "3. The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution . . . ." 18 U.S.C.A. Rule 21.

was the Government's determination to disregard the order setting Laredo as the place for trial under the federal rules, that it had secured an identical new indictment in Austin and that it had resorted to this stratagem only because the court had transferred the case from Corpus Christi.

Rule 48(a) provides that the United States attorney may secure a dismissal only "by leave of court". Prior to the adoption of this rule in 1944, of course, the prosecution had an unfettered option to dismiss. The new rule was intended to reverse this practice. It contemplated that district courts to whom such motions were addressed should exercise a supervisory power over dismissals. The notes of the Advisory Committee are illuminating:

> "The first sentence of this rule will change existing law. The common-law rule that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court, prevails in the Federal courts. . . This provision will permit the filing of a nolle prosequi only by leave of court. This is similar to the rule now prevailing in many States.". 18 U.S.C.A. Rule 48.

Clearly the Rule contemplates that the court is to assume more than a passive role in approving dismissals. The Government's motion must receive *the sanction of the court.*[9]

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[9] See *United States* v. *Doe*, 101 F. Supp. 609 (D. Conn. 1951), wherein Judge Hincks denied such a motion on the ground that the Government had not shown the reasons for dismissal. He said (*id.* at 611):

> "In my view, the rule contemplates that the court shall exercise a sound discretion in the premises. And on fundamental principles, at least in the absence of very exceptional circumstances as for instance where the defendant has received

As the dissenting judge in the Court of Appeals demonstrated, Judge Kennerly failed to recognize his obligations under the new rules. He stated that he had always during his 24 years on the bench granted motions to dismiss. He felt that if he had "discretion", he "must exercise" it and "allow" the indictment to be dismissed (R. 162). Passive approval of the dismissal here constitutes plain error.

Further, approval of the dismissal, whether as a result of conscious and responsible exercise of discretion or not, was also error. The court should not have allowed the Government to exploit the dismissal device in this fashion. Rule 21(a) provides a mechanism for real, and not sham, transfers of criminal indictments. The power and responsibility for decision which it invests the courts is not subject to be overridden by the Attorney General and his minions. Rule 21(*c*) required that the prosecution go forward in Laredo, if at all. The court was told that the only reason for the Laredo dismissal was to permit trial in Austin. The Corpus Christi court had already held that Laredo would be fair for both sides. It had rejected the Government's contention, pressed at the hearing on the transfer motion, that Laredo would be unsuitable as a place of trial. The Government's subsequent dismissal motion was based on the very same

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a substantial sentence for another phase of the same offense, *the court may not properly approve a dismissal of the entire case against any given defendant unless satisfied that the government lacks sufficient evidence to warrant a prosecution.* Especially is this so where the matter is before the court on indictment as distinguished from information." (Emphasis supplied).

See also Proceedings of the Institute on Federal Rules of Criminal Procedure (1945), 5 F.R.D. 150, 197, 201-202, 248-249.

argument. It was an attempt to relitigate the issue. The Laredo court was bound to deny any motion to dismiss based on this reason. Final decisions of courts, entered upon evidence and after argument, may not be circumvented in this fashion. The Government could not transfer the case from Laredo and a dismissal admittedly requested for that purpose should not have been approved.

II. This Court Can Grant Full Relief.

Petitioner here has applied both for ordinary certiorari to correct the error of the Court of Appeals, and for the prerogative writs of mandamus and prohibition to be directed to Judges Allred and Rice requiring them, respectively, to reverse the Laredo dismissal and to order transfer to Laredo of the Austin indictment. This Court can grant full relief. It has four alternatives. It may:

(a) Order the dismissal in Laredo reversed, either (1) through the petition for certiorari from the Court of Appeals' dismissal of the appeal from Laredo, or (2) by the issuance of original prerogative writs directed to the Laredo court, or;

(b) Order the Austin indictment dismissed or transferred back to Laredo, either (3) through the petition for certiorari from the Court of Appeals' judgment refusing the writs prayed for there, or (4) by original prerogative writs directed to the Austin court.

(a) Relief From the Laredo Dismissal.

(1) By Certiorari: The Court of Appeals should have considered the merits of the appeal and entered its judgment reversing the Laredo dismissal. We have set out our contentions on the merits above. It is

apparent that the Court erred in not reaching them. It avoided decision on these important issues by holding that it had no jurisdiction of the appeal from the dismissal in the Laredo court because not a final order. We submit the court did have jurisdiction.

We are unable to understand the reasoning of the court when it bases its refusal to consider the merits of the appeal from Judge Kennerly's order of dismissal on the sole ground that it was not final. Section 48(a) is in the following language:

> "The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the *prosecution shall thereupon terminate.*". (Emphasis supplied).

The Court of Appeals, however, appeared to think that the order of dismissal did not terminate the proceeding. In effect, it treated the second indictment in Austin and the dismissal of the first indictment in Laredo as *equivalent, for appeal purposes, to* a motion for transfer made by the Government. The dismissal clearly was not an order of transfer. It could not be. The Government has no power to move for a transfer under any circumstances, as we have shown; the Court has no power to approve a transfer on the Government's motion. The order of dismissal was clearly a "final" order. It terminated the prosecution which had began with the indictment obtained in Corpus Christi.

In these circumstances the order of dismissal was appealable because of the prejudice to the defendant in permitting the prosecution to select an alternative forum in plain disregard of the order which had been entered by the Corpus Christi Court after an elaborate hearing, submission of briefs, and findings as to the suitability of Laredo as a place for trial.

(2) By Original Prerogative Writs: In addition, even if the order dismissing the indictment was not a final order, relief may be granted by the issuance of original prerogative writs ordering the Laredo court to expunge the dismissal order from the record. The writs are justified and called for here because of the error of the district court in granting the dismissal for the reasons submitted by the prosecution, which constituted a plain attempt to evade and circumvent the valid transfer order and the terms of Rule 21, and its failure to exercise the responsibility imposed by Rule 48(a).

(b) *Relief from the Austin Refusal to Dismiss or Transfer Back to Laredo.*

(3) By Certiorari: Petitioner requested the court below to issue writs of mandamus and prohibition requiring the Austin court to transfer the second indictment to Laredo, or to dismiss.

The transfer motion was made under Rule 21(*b*), permitting transfers in the "interests of justice." We submit that it was error for the Austin court not to retransfer the case. Plainly it is in the interests of justice to hold the prosecuting attorney rigorously to the Rules of Criminal Procedure. The second indictment in Austin was a transparent attempt to reverse, by the fiat of the United States attorney, a valid order of transfer entered by the court and entitled to finality under Rule 21(*c*). The Austin court abused its duty in the matter by not ordering the indictment to be transferred to Austin and requiring the prosecution to proceed in the division to which it had been originally sent by the court.

Writs of mandamus and prohibition, either to compel transfer to Laredo or dismissal of the Austin in-

dictment, were proper in the Court of Appeals. They were the only method of reviewing the Austin court's refusal to dismiss or transfer. Petitioner will not be able to claim that trial in Austin was improper on appeal from convictions. As stated in *Ford Motor Co. v. Rygin*, 182 F. 2d 329, 330 (2d Cir. 1950), cert. den. 340 U. S. 841 (1950), involving mandamus to review refusal to grant a transfer under 28 U.S.C. (1946 ed.)

> "Judge Hand and I [Judge Frank] think this the kind of interlocutory order with which this court can properly deal by way of such a writ, since should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, *for petitioners could hardly show that a different result would have been reached had the suit been transferred . . .*" (Emphasis supplied).

(4) By Original Prerogative Writs: This court has power, as an original matter, to grant the writs of prohibition to correct the error of the Austin court in allowing the second indictment to stand for trial there, and should compel it to dismiss the second indictment or to transfer its trial to Laredo. 28 U.S.C. 1651.

The relief prayed for from the court is, of course, alternative. The result sought by petitioner is to require that the Government proceed with the trial of this case in Laredo, the venue fixed by order of the District Court in Corpus Christi after full consideration of the evidence and argument. If this relief is not granted, and if the Government's tactics in this case are successful, the effect will be to rewrite Rules 21(a) and (b) to provide that if the court determines the prose-